

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 243.

THE UNITED STATES, APPELLANT,

vs.

THE OMAHA TRIBE OF INDIANS, APPELLEE.

**BRIEF OF APPELLEE IN OPPOSITION TO
MOTION BY APPELLANT FOR AN ORDER
REQUIRING THE COURT OF CLAIMS
TO MAKE AND CERTIFY ADDITIONAL
FINDINGS OF FACT.**

Counsel for Appellant has moved the Court to direct the Court of Claims:

1. To find whether the lands between Ayoway Creek, in the State of Nebraska, on the south and the Missouri river on the north belonged when the Omaha Indian treaty of 1854 was made to the Omaha or Ponca tribe of Indians.

2. Whether the Indian title to the lands between the creek and river named was conceded by the United States by the Ponca Indian treaty of March 12, 1858, to belong to the Ponca tribe.

Appellee objects to this order being made and to the attempt of Appellant to bring coercion to bear on the

Court of Claims to find specific facts contrary to the proof adduced before the Court of Claims, in favor of Appellant.

1. Because the Court of Claims has in fact as the record (Finding III trans. rec., pp. 16-17), shows already found that the land in question (placed by the Court to the disadvantage of the appellee Indians at only 783,365 acres), "belonged to said Omaha Indians" (p. 16). The issue as to which tribe of Indians owned the land was squarely put in issue by the pleadings, the United States in order to defeat the Omahas having filed a counter claim (rec., p. 13-14) for \$58,000 on the allegation that the land between Ayoway Creek and the Missouri river on the north, being the very lands in question, "was not the property of the Omaha Tribe, but belonged to the Ponca Tribe of Indians at the date of said treaty" (Omaha treaty of March 16, 1854), and Appellee having by replication (p. 14) joined issue on the counter claim and asserted "that the same did belong to the said Omaha Tribe of Indians."

2. That there is no necessity for nor would there have been any materiality in a finding by the Court of Claims as to whether the United States by the Ponca treaty of March 12, 1858, conceded the Indian title to the land in question to be in the Ponca tribe of Indians. The Court of Claims was vested with jurisdiction to determine the claim of the Omaha tribe only. When it found that the lands in question in 1854 did *belong to the Omaha tribe* it completely exercised its jurisdiction. It is true that a finding that the lands in 1854 belonged to the Omaha tribe by inference almost necessarily excludes a finding the Indian title in 1858 was in the Poncas, but the Court would have traversed beyond its au-

thority had it undertaken to make the second finding appellant requests this Court to require. This second finding really is one of law and a casual perusal of the Ponca treaty of March 12, 1858 (12 Stats., 997) will show that that treaty did not deal with or undertake to deal with the lands in question but was merely designed to settle the roving, lawless Poncas on a defined small reservation (outside any lands claimed by the Omahas) and, as incidental thereto, for a small consideration obtained from the Poncas a quit claim to any and all claims of any kind the Poncas might have against the United States, including claim to Sioux lands in Dakota.

Knowing it is protected by express Ponca treaty against liability to the Poncas the United States undertook to use that tribe who lived in Dakota and north of the Missouri as the record showed, to defeat the Omahas' claim, but was unsuccessful before the Court of Claims.

While unwilling the Court should order the Court of Claims to certify as to the two special findings of fact only requested by Appellant the Appellee is willing the Court of Claims certify the whole record to this court and has so moved in Case No. 244, wherein Appellee has cross appealed. Appellee below moved the Court of Claims to certify the whole record but it refused. Appellee made the motion believing the cause was a proceeding in equity and not at law; that the result would be a finding by this Court that the Omahas had Indian title north of a due west line drawn from Ayoway Creek to considerably more than the 783,365 acres found by the Court of Claims; that the Court would find Appellant as trustee liable to claimant on other items and in larger amounts than found by the Court below, and that this court would hold that in equity Appellee was en-

titled to interest on the money for the lands ceded north of Ayoway Creek by the Omaha treaty of 1854, which moneys should have been, after said treaty, placed in the Treasury of the United States at interest to the credit of Appellee but were not because Appellant could not decide how much land there was north of Ayoway Creek owing to its inability or unwillingness to determine a dispute between the Pawnee and Omaha tribes as to the western Omaha boundary line, the Omaha treaty of 1854 running a due west line from Ayoway Creek but not stating where the west line should end in the West and the Pawnee treaty of 1856 providing that the Pawnee *eastern* boundary should run to the place where the Omaha *western* boundary ended.

The Court of Claims in its original findings and judgment gave Appellee interest from 1854 at 5 per cent on the sum of \$94,739.54 it found due Appellee by Appellant for the unpaid for lands north of Ayoway Creek (Finding 3, p. 17). Appellant moved the Court of Claims for a new trial, for amended findings of fact (substantially those embraced in its present motion) and opposed allowance of interest as prohibited by section 177 of the Judicial Code. The Court of Claims without giving Appellee opportunity to reply withdrew its original findings and its judgment and opinion allowing interest, overruled Appellants' motion for a new trial and for amended and additional findings of fact and struck out all allowance of interest to Appellant. The Appellant contends it is entitled to interest, that the Court was right in originally allowing it and that the Court below erred adversely to it in other respects that the full record would disclose. It prayed the Court of Claims to have the present record show its original finding and judg-

ment allowing interest, but the Court while allowing Appellees' appeal directed that the transcript of record should not show that interest, amounting to more than \$200,000, had been originally allowed and then withdrawn.

Appellee believes the foregoing, without going into details, shows that the present motion of Appellant should be denied.

But to avoid repetition of same, Appellee submits below certain details, pertinent to this motion and also pertinent to the motion for the full record made by Appellee in Case No. 244, and asks that both motions be considered together.

When the Omaha tribe sued the United States the latter undertook a defense and sought, among other things, to claim that the Ponca tribe was entitled to the lands in northern Nebraska between Ayoway Creek and the Missouri river on the north, and not the Omahas.

The Omaha treaty of 1854 had clearly recognized by its express terms (p. 16) that there was more than 300,000 acres being ceded by the Omahas north of Ayoway Creek and that if the tribe refused to take this larger tract as its reservation (as the United States desired in order to have the Omahas as a buffer between the warlike Sioux and Poncas north of the Missouri river and the settlers who were pressing into eastern and southern Nebraska) and instead insisted on a smaller area of 300,000 acres south of Ayoway Creek in order to be removed from the Sioux that the Omahas should be paid for the excess acreage north of Ayoway Creek. The Omahas resisted some pressure from the United States and finally after insisting for nearly two years obtained the 300,000 acres to the south. The area north of Ayo-

way Creek was only, however, guesswork, surveys of Nebraska not beginning until in the sixties.

The Omaha western boundary line remained unsettled, article 1 showing the treaty did not place it (p. 16).

In 1857 the United States made a treaty with the Pawnee tribe (11 Stats., 729) and made the eastern boundary line of the Pawnees the western boundary line of the Omahas but did not undertake, as the Omaha treaty likewise had not undertaken (probably for expediency sake since the United States by the two treaties was acquiring for settlers all lands in Nebraska and the two tribes named between them owned and occupied all Nebraska north of the Platte and the United States was not acutely concerned with ascertaining how much in money it should apportion to the Omahas) to state where the intertribal boundary line was running north and south, the Pawnee treaty as to this boundary line simply reading, "on the east by the lands lately purchased by the United States from the Omahas." The two treaties therefore do not aid in determining this line. But, while leaving this west-east Indian tribal line undetermined the two treaties taken together, dispose of the present attempt by the United States to set up the Poncas as a stalking horse to defeat the Omaha claim. The Pawnee treaty provided that the northwestern boundary line of the Pawnees should be on the Kéha-paha river and that the Pawnee northern boundary line should be as follows: "On the north by the Keyapaha river to its junction with the Niobrara L'eau qui Court or Running Water river; and thence, by that river, to the western boundary of the late Omaha cession." The effect therefore is to fix the treaty—recognized *Omaha northwestern* point as being on the Niobrara river. That river then continues east until it

flows into the Missouri river where the town of Niobrara City, Nebraska, now stands. The Missouri river at this point ceases to flow from the north but flows due east. The Omaha northern line therefore in fact ran, as it naturally would run, along the Niobrara river to the Missouri river and thence east by that river to where the Missouri river makes its next celebrated bend at the junction point of the States of Nebraska, South Dakota and Iowa and there it turned and flowed due south, passing on the way Ayoway Creek and thus forming both part of the northern and *all* of the eastern boundary of the Omaha tribe, as set forth in the Omaha treaty of 1854.

Indian Commissioner Manypenny, who made the Omaha treaty of 1854, adopted this natural river course boundary line for the Omaha tribe, and while in the absence of surveys, he erred $2\frac{1}{2}$ miles in locating the latitude of Ayoway Creek and 9 miles in locating the latitude of the confluence of the Niobrara and Missouri rivers and similarly erred in a report in fixing 42 deg. 40 mins. as the latitude south of which the Omahas had ceded lands to the United States he did at the same time indicate what lands he had purchased and that the rivers named were the boundaries by filing a map signed by him in August, 1854, as bounding his Omaha purchase. This map shows the Omaha northern and eastern boundary as described. It is appended hereto for the court's inspection. It fixes the Missouri River as the Omaha tribe's eastern and northern boundaries.

The Court of Claims had this map before it and it properly gave, over appellants' strenuous objection that it should disregard the map and go not by water courses but by latitude and longitude lines in dealing with the illiterate Omahas, great weight to this map. Appellees'

objection to the Court of Claims action was that thereby the Court reduced unduly Appellees' acreage north of Ayoway Creek by shortening or moving too far east the western boundary line of the Omahas. The Court accepted the Land Office calculation of the area north of Ayoway Creek and west as far as the confluence of the Niobrara and Missouri rivers. It did this notwithstanding in 1856 Commissioner Manypenny the record shows officially stated that the western boundary line was not intended to be definitely fixed by his map but merely tentatively fixed and in 1857 the Indian Office conceded by the Pawnee treaty that the western line ran farther west than in the Manypenny map by making the boundary line between the two tribes run to a point on the Niobrara river and hence west of where placed by the map, namely, the confluence of the two rivers. Appellee desires the entire record because it will show the Omahas entitled by General Land Office calculations to several hundred thousand acres more than allowed by the Manypenny map western line calculations, and the United States having acquired this land in trust for the Omahas and never having paid for same should, *as trustee*, be required on settled equity principles be made to account for the same, with interest. In equity cases the entire record is required by this court of the Court of Claims, *U. S. vs. Old Settlers*, 148 U. S., 427.

The Manypenny map as to the Omahas being entitled to all land in Nebraska south of the Missouri and Niobrara rivers and the Poncas only to land north of those rivers in Dakota is supported in the record by the scientific Nicollet Fremont map of 1840 and the Colton map of Indian reservations of 1853.

It also was supported by official reports, introduced in the record, of Indian Office regulations and reports of

Indian agents from 1837 to 1856, all showing that those agents and regulations gave the land south of the rivers named to the Omahas and Pawnees and placed the Poncas north of the Missouri river and in Dakota some miles beyond and north of the confluence of the Niobrara and Missouri rivers. Kingsbury's History of Dakota Territory placed them at Fort Randall, thirty miles above the Niobrara and on Ponca Creek, in the vicinity of the fort.

The oral testimony of the oldest Omahas all was to the effect that they had hunted all over the area involved and also that they had old burying grounds and villages in and claimed the territory the Court of Claims conceded them and more lands besides, their hunting claims extending along the Niobrara river as far as the junction of the Niobrara and Keyapaha rivers, and some of them, with Ponca blood in their veins, speaking of visits they had made to the Poncas, they always crossing the Missouri on the north and then continuing further north to where the Poncas were situated.

The United States it is true did place on the stand certain Poncas who claimed for the Poncas the right to land from the White river far to the north and south of the Missouri river into the region here in dispute, but on cross-examination these witnesses admitted they were born and passed their youth on the "cold" side or *north* of the Missouri, that they make their complaints to Fort Randall, 30 miles north of the confluence of the Niobrara and the Missouri, that they had had a "great mourning" in 1858 because when their chiefs returned from Washington they were told the United States had rejected their claim to the Omaha reserve north of Ayoway Creek upon the Omahas electing to take a 300,000-acre reserve south of that creek. They admitted the Omahas and Poncas spoke the same language and had similar villages and burying grounds and it was proved that centuries be-

fore (by tradition) the Poncas as a wilder band had separated from the Omahas and moved so far north that they had lost the use of corn and had only in later years attempted to return south.

With all these facts before it Appellee submits the Court of Claims finding is conclusive and is a "special verdict" in the Omahas favor unless this Court as the Appellee is willing it should, will examine the whole record and pass for itself on the facts.

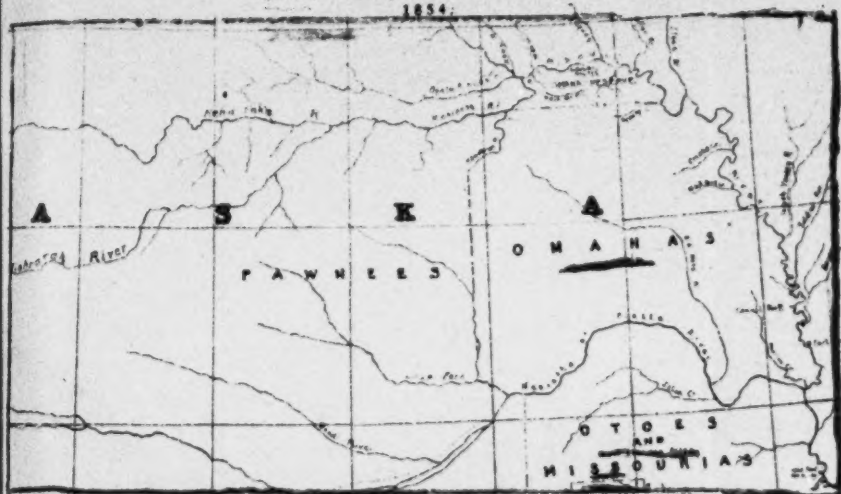
When the Court of Claims found against Appellant the United States made a motion in the lower court similar to the instant motion saying, *inter alia*. "The specific ground of objection is that the record does not support the statement that the country north of the due west line from the mouth of Ayoway Creek belonged to the Omaha Indians," and also that Commissioner Manypenny had reported the "northern limit of the cession extended to 40 degrees 40 mins. north latitude" and insisted it should have such findings, but the Court of Claims denied such motion and held to its findings of fact, as it did to its findings in refusing Appellee any land further west than the tentative "air route" west line given the Omahas by the Manypenny map notwithstanding a full record showing Indians ran boundaries by water courses and that one of their main rivers, the Elkhorn, ran far west of the Manypenny line and west of the confluence of the Niobrara and the Missouri. It is submitted that a special verdict having been rendered that the lands here involved "belonged" to the Omahas the court either should accept that special verdict or require the full record.

C. H. MERILLAT,
C. J. KAPPLER,
HIRAM CHASE,
Attorneys for Appellee.

MAP OF NEBRASKA AND KANSAS TERRITORIES

Showing the Location of the Indian Reserves
according to the Treaty of 1854.

Copyright, EASTMAN, KIMBELL & CO. 1854.



I have examined this Map in regard to the Indian Reservations and find the same correct.

*Indian Office
Washington Sept 5, 1854*

John Thompson

Chief of Indian Affairs

Note: The words in the northern or top part of this map immediately beneath the words "Missouri river" are "Omaha Reserve", and the dotted line shows the "Ayoway Creek" line but places the "Niobrara river" 9 miles too far south.